IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 12286 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

M/S.SWASTIK PESTICIDES & CHEMICALS THRO' VIJAYKUMAR

Versus

THE STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 12286 of 2004

MR.P B SHARMA for Petitioner No. 1

MS NV JOSHI, LD.APP for Respondent No. 1

RULE SERVED BY DS for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE C.K.BUCH

Date of decision: 13/05/2005

ORAL JUDGMENT

By way of this petition under Article 226 of the Constitution of India r/w. Section 482 of the Code of

Criminal Procedure (for short 'the Code'), the petitioner-orig.accused no.2 of Criminal Case No.1462 of 2001, pending in the file of ld.Chief Judicial Magistrate, Surendranagar, has prayed for quashing of Criminal Complaint as well as prosecution instituted thereon in reference to the provisions of Section 3(K)(1), 17(1)(a) and 18(1)(c) of the Insecticide Act, 1968 (hereinafter referred to as 'the Act').

2. The petitioner-orig.accused no.2 (hereinafter referred to as 'the accused-company') is a registered company under the Companies' Act, 1956, involved in manufacturing insecticides. It is contended by the petitioner-accused that the accused-company also possesses ISO-9001 certificate having its registered office at New Delhi. The accused-company is also having various sales and marketing offices in various parts of India and one of such offices is located in the City of Ahmedabad. The accused-company is manufacturing insecticides/pesticides including Endosalfan-35% EC. The accused-company was served with a show cause notice on 20th September, 2001 because a sample of Endosalfan drawn by the Inspector, sent for test/analysis, was found misbranded. Immediately, on receipt of the notice, as averred was responded by the accused-company contesting the report of analyst and expressed its intention to get the sample retested/reanalysed at their own costs as per the provisions of Section 24(3) of the Act, within stipulated period of 28 days to the complainant as per the Act. The say of the petitioner is that despite a request having been made by the said application, no sample was sent to the Central Insecticide Laboratory for (short 'CIL'). The grievance of the petitioner is that it was obligatory on the part of the complainant to send the sample or to make necessary arrangement, if required, to see that the sample is retested by the CIL even then he straight way filed a complaint on 18th December, 2001. It is not a matter of dispute that shelf life of the product from which the sample was drawn, was to expire in the month of June, 2003. As the accused-company was not permitted to exercise its right envisaged under Section 24(3) of the Act, the prosecution instituted by the complaint cannot sustain and the same, therefore, requires termination. The accused-company has, therefore, applied for dismissal of the complaint and according discharged the accused-company from the prosecution vide Application Exh.18 on 6th February, 2004. The ld.Chief Judicial Magistrate after hearing the learned counsel representing the accused-company dismissing the application and rejecting the request for discharge and for dropping of proceedings vide order

dated 27th October, 2004 and this order is under challenge before this Court by way of present petition.

3. The accused-company has produced relevant documents as annexures including proceedings drawn by the trial Court upto 13th October, 2005. Till May, 2002, the accused-company was not served with the process of the Court and it appears from record that the advocate Mr.B.M. Trivedi appeared for the accused-company on 7th May, 2002 and undertook to appear on behalf of the accused-company and ultimately on 12th June, 2002, the accused-company appeared before the Court. It is clear from the proceedings that on the next date of hearing on 10th July, 2002, the complainant was not present in the Court. It is also clear from the record that an attempt to get exemption from personal appearance was made by the accused-company and ultimately on 6th February, 2004, the accused-company moved for dropping of proceedings and to discharge it.

4. Mr.P.B. Sharma, learned counsel appearing for the accused-company, has taken me through memo of the petition and especially the grounds justifying invocation of inherent powers of this Court mentioned in para:21 of the memo of the petition. He argued that the ld.Chief Judicial Magistrate, Surendranagar, has grossly erred in rejecting the application and in not dropping of the proceedings. Though the application/request for retesting the sample was not complied with and the scheme of the Act especially provision of Section 24(3) is very clear and mandatory in nature, respectively. According to Mr.Sharma, neither the sample was forwarded by the complainant under Section 22(6)(ii) of the Act before the Court nor the accused-company was asked to deposit the retesting charges. One of the submissions of Mr.Sharma is that the complainant has failed to comply with the mandatory provision of Section 22(6)(ii) of the Act by not providing the copy of the sample before the Court while instituting Criminal Complaint against the accused-company. None-compliance by the complainant requires to be held to be futile attempt to continue prosecution without complying with the mandatory provisions of Section 24(3) of the Act or an act of some negligence. This conduct of the complainant has made the Government Test Analysis Report conclusive and it is totally against the intention of the legislature and the purpose and construction of the Act. For the sake of convenience, main grounds pressed into service by Mr.Sharma are that :-

(i) The complaint itself is not in accordance

with the provision of Sec.24(3) and 24(4)of the Insecticides Act. Admittedly the Petitioner herein has made a formal request u/s.24(3) of the Act, against the show cause notice of the Complainant within 28 days and formally requested to re-test the sample at the Central Insecticides Laboratory at their own cost. The request of the Petitioner herein is not complied with and ultimately no re-testing of the sample conducted at Central Insecticides Laboratory till the shelf life of the sample expired. Therefore the Petitioner herein is being deprived of the valuable defence enjoined under the Act.

(ii) The Complainant has deliberately not mentioned in the complaint about the request of the Petitioner herein, about their request for re-testing made u/s.24(3) well within the stipulated period of 28 days. It is mala fide effort of the Complainant to suppressed the material fact before the Hon'ble Court of Chief Judicial Magistrate with an intention to restrict the Court to apply their own discretion, and could have sent the sample in their own motion to the Central Insecticides Laboratory for re-testing. Therefore, the suppression of material fact by the Complainant leads to futile proceedings of the entire matter before the Hon'ble Court of Chief Judicial Magistrate at Surendranagar.

(iii) As per Sec.24(4) of the Act, unless re-testing of the sample conducted as per the request of the Petitioner made vide Sec.24(3), the prosecution cannot be proceeded. Therefore, as the shelf life of the sample has already expired without conducting the re-testing at the Central Insecticides Laboratory, the continuation of entire proceeding is nothing but abuse of process of law.

5. In response to the query raised by the Court Mr.Sharma submitted that there is no direct decision of this Court on the point agitated by the Court. However,

according to Mr.Sharma, under certain special statute like Food Adulteration Act, Drugs and Cosmetics Act, this Court has turned down the proceedings in all cases where it was found that mandatory provisions of the Act are violated and such violation is likely to result into serious prejudice. However, Mr.Sharma has placed reliance on the ratio of the decision of the Apex Court in the case of State of Punjab v. National Organics Chemical Industries Ltd., reported in 1996 (11) SCC 613 and it is argued that it was obligatory on the part of the complainant to deliver one portion of sample to the accused-company. In the cited decision, the accused from whom the sample of insecticide was taken was not provided of one portion. The Apex Court has held that the accused has been deprived of his statutory opportunity to have the sample tested by CIL and in such a situation the complaint is liable to be quashed. Mr.Sharma has mainly placed reliance on the observations made by the Apex Court in this decision, whereby it is observed that the complaint should be lodged with utmost discharge so that the accused may opt to avail the statutory defence. According to Ms.N.V. Joshi, ld.APP, this decision would not help the present petitioner because the petitioner is a manufacturer and sample cannot be said to have been drawn from him so it was not obligatory on the part of the complainant to give or forward one portion of the sample to the CIL. It appears that the Apex Court has observed that such a situation, conjoint reading of relevant sections and the scheme should be made and the Apex Court read a section of Sections 21, 22 and 24 of the Act and ultimately, expressed the view that the complaint requires to be quashed. At this stage, it is necessary to have a look on the procedure prescribed under Section 22 of the Act. The manner in which Insecticide Inspector is empowered to seize the record, etc. and also to send the sample drawn for analysis and to send such analysis to the analyst. Each step should be scrutinised because the relevant provisions of Sections 22 and 24 of the Act are mandatory in nature. sub-sections (5) and (6) of Section 22 read as under:-

"22(5): Where an Insecticide Inspector takes a sample of any insecticide for the purpose of test or analysis, he shall intimate such purpose in writing in the prescribed form to the person from whom he takes it and, in the presence of such person unless he wilfully absents himself, shall divide the sample into three portions and effectively seal and suitably mark the

same and permit such person to add his own seal and mark to all or any of the portions so sealed and marked :

Provided that where the insecticide is made up in containers of small volume, instead of dividing a sample as aforesaid, the Insecticide Inspector may, and if the insecticide be such, that it is likely to deteriorate or be otherwise damaged by exposure shall take three of the said containers after suitably marking the same and, where necessary, sealing them.

22(6): The Insecticide Inspector shall restore one portion of a sample so divided or more one container, as the case may be, to the person from whom he takes it and shall retain the remainder and dispose of the same as follows :

(i) One portion or container, he shall forthwith send to the Insecticide Analyst for test or analysis; and

(ii) the second, he shall produce to the Court before which the proceedings, if any, are instituted in respect of the insecticide."

6. In the cited decision of the State of Punjab (supra), the Apex Court has discussed the above two sub-sections in detail and following part is found relevant to resolve the controversy brought before the Court :

"..... Sub-section (4) of Section 24 envisages that "unless the sample has already been tested or analysed in the Central Insecticide Laboratory, where a person has under sub-section (3) notified his intention of adducing evidence in controversion of the Insecticide Analyst's report, the Court may, of its own motion or in its discretion at the request either of the complainant or of the accused, cause the sample of the insecticide produced before the magistrate under sub-section (6) of Section 22 to be sent for test or analysis to the said laboratory,

which shall make the test or analysis and report in writing signed by, or under the authority of, the Director of the Central Insecticides the result thereof, and such report shall be conclusive evidence of the facts stated therein". Under sub-section (6), the cost of the test or analysis made by the Central Insecticides Laboratory, under sub-section (4) shall be paid by the complainant or the accused, as the court shall direct. Thus, it would be clear that after the inspection and seizure of the insecticide, the Insecticide Inspector shall divide the insecticide into three portions, as contemplated and in the manner prescribed and deliver one such sample to the manufacturer or person from whom insecticide was taken. One should be sent to Insecticide Analyst. After the receipt of the report, the accused would be notified of the result of the report. Thereafter, the complaint is required to be lodged in the Court. At that stage, two options are open to the accused. The accused is entitled to have one copy of the sample entrusted to him to have it notified to the Court for proving to be contrary to the conclusive evidence of the report of the analyst: after such a notification having been given to the Court, he is entitled to have it tested by Central Insecticides Laboratory and adduce evidence of the report so given. That such certificate by the Director of the CIL has a proof of his defence to dislodge the conclusiveness attached to the report of the Insecticide Analyst under sub-section (3) of Section 24. The other option is, after the complaint is laid in the Court, the copy of the sample that is lodged with the Court by the Insecticide Inspector would be requested to be sent by the Court to the CIL and the report thus given by the Director of CIL shall be conclusive evidence as to the quality, content and facts stated therein. The cost thereof is to be borne either by the complainant or by the accused, as may be directed by the Court."

7. On plain reading of Section 24 of the Act, it seems that it is a code within code. It deals with the report of Insecticide Analyst and sub-section (5) of Section 24 is in respect of the cost of test or analysis by the CIL. Sub-section (4) shall be paid by the complainant or the accused as the Court shall direct so it would be wrong to interpret that in each case, the

cost must be borne by the person who prays for retesting/ reanalysis. The payment of cost rests on the decision of the Court on set of facts of each case. One may not miss about other option after the complaint is led in the Court. A copy of the sample i.e. lodged with the Court by the Insecticide Inspector can be sent to CIL on request made and in that eventuality, the report given by the Director of CIL become conclusive evidence as to the quality, contents and facts stated therein and the earlier report shall have no bearing whatsoever and the same has to be treated as "worth paper" on which it is expressed.

8. In the case of M/s.Jayshri Agro Industries Ltd. and others v. State of Punjab, reported in 2003 (2) FAC 276, Punjab and Haryana High Court has observed that right enjoined under Section 24(3) of the Act has to be complied with and it cannot be ignored. If the complaint is filed without complying with the said right, the same is not sustainable. I would like to quote the relevant extract of the cited decision (re.paras:3, 4 and 5) :

"3. Despite the request having been made by the petitioner as envisaged under Section 24(3) of the Insecticides Act, 1968 (herinafter referred to as 'the Act'). Admittedly, no sample was sent to the Central Insecticide Laboratory but the complaint was filed on 18.4.1996. Admittedly, the shelf life of the product was to expire in September, 1996. The petitioner has been required to face prosecution under Sections 3(k)(i), 17,18, 29 and 33 of the Act read with Rule 27(5) of the Insecticides Rules, 1971. The perusal of the complaint shows that the right as envisaged under Section 24(3) of the Act was not permitted to be availed of by the petitioner as nothing in this regard has been averred in the complaint.

4. Learned counsel for the petitioner has argued that the right as envisaged under Section 24(3) of the Act, despite the question having been made was not granted to the petitioner. Thus, the complainants are not justified in filing the complaint and that the proceedings initiated in pursuant thereto are not sustainable. The aforesaid provision reads as under:-

"24. Report of Insecticide Analyst.-(3) Any document purporting to be a report

signed by an Insecticide Analyst shall be evidence of the facts stated therein, and such evidence shall be conclusive unless the person from whom the same was taken has within 28 days of the receipt of a copy of the report notified in writing the Insecticide Inspector or the court before which any proceedings, in respect of the sample are pending that he intends to adduce evidence in controversion of the report.

4. Unless the sample has already been tested or analysed in the Central Insecticide Laboratory, where a person has under sub-section (3) notified his intention of adducing evidence in controversion of the Insecticide Analyst's report, the Court may, of its own motion or in its discretion at the request either of the complainant or of the accused, cause the sample of the insecticide produced before the magistrate under sub-section (6) of Section 22 to be sent for test or analysis to the said laboratory, which shall make the test or analysis and report in writing signed by, or under the authority of, the Director of the Central Insecticides the result thereof, and such report shall be conclusive evidence of the facts stated therein"."

9. This decision is also found relevant in view of the facts of the present case. It is open for the accused-company to ask for retest of the part of sample by making a request either to the Inspector or to the Court. The accused-company has option to make the request to the Inspector or the Court. Undisputedly, in the present case, the request was made by the accused-company to the complainant.

10. It would be wrong to interpret that manufacturer is not entitled to request the complainant or to the person who has drawn the sample to send the sample for retest to CIL and he is supposed to approach the Court and the Court only and if the Court desires then at the cost of the manufacturer only, the sample can be sent for retest. The Rajasthan High Court in the case of Mohan Lal v. State of Rajasthan, reported in 2000 Cr.L.J. 2623, has observed that :

"4. I have considered the above arguments.

The relevant facts are that Shri Dinesh Chandra, Insecticides Inspector took a sample of Methyl Parathion 2% Dust on 29.11.1990 from M/s. Kraya Vikraya Sahakari Samiti, Rawatsar, of which petitioner Mohan Lal was Genral Manager. After sealing the samples in accordance with the rules, he sent one sample to Insecticides Analyst, who vide report dated 31.1.1991, opined that Methyl Parathion 2% Dust was misbranded. The Inspector thereupon sent a notice to the petitioner on 4.2.1991. The petitioner made a request for retesting of the sample by the Central Laboratory vide his letter dated 18.2.1991 but it was not done. The Insecticides Inspector, after obtaining sanction for prosecution, filed a criminal complaint in the Court of the Magistrate on 23.10.1991, whereupon summons were issued to the petitioner. The petitioner put in appearance in the Court on 20.4.1992. He moved an application for getting the sample tested on 27.4.1992. The application of the petitioner for retesting of the sample by the Central Laboratory was rejected on the ground that the shelf life of the sample was going to end in April, 1992 itself. Thereafter, the petitioner made an application for dropping the proceedings against him, which was rejected by the impugned order."

11. In the above cited case of Rajasthan High Court, admittedly the accused had intimated his intention to adduce evidence in contravention of the report of the Insecticide Analyst sent to him. The Insecticide Inspector did not take steps to get the second sample tested by the CIL. As per sub-section (4) of Section 24, the second sample can be ordered to be reanalysed by CIL on the request made by the complainant-Inspector also. In such a situation, it becomes the duty of the Insecticide Inspector to file a complaint promptly and he should take all necessary steps if any request/demand reaches to him for retesting the sample by the CIL. In the case before the Rajasthan High Court also, there was person from whom the sample was drawn. In the same way, in the case of Mohinder Singh v. State of Punjab, reported in 2004 Cr.L.J. 2656, the High Court has observed as under :

"12. Faced with the above situation, learned Assistant Advocate General contended that the summons issued by the Court on 25.1.2000 for

3.3.2000 were sent by the Deputy Director, Agriculture, Faridabad, to the petitioners on 28.2.2000, and as such, the letter cannot now be heard to say that they did not become aware of the filing of the complaint in Court, before the expiry of shelf-life of the product. I am afraid, the respondent cannot be allowed to place reliance on Annexure R-2, in order to fasten the petitioners with the knowledge of complaint having been filed in Court against them before the expiry of shelf-life. Reason being that there is no document on record to indicate that the original of Annexure R-2 was, infact, sent by the Deputy Director, Agriculture, Faridabad, and if at all it was so sent, the same was received by the petitioners. In any case, the petitioners had already doubted the correctness of the report of the Quality Control Laboratory and had also made a specific request to the Insecticide Inspector for the re-analysis of the sample. Therefore, if had become the bounden duty of the complainant to get the sample re-tested from the Central Insecticides Laboratory. But, as is the admitted case, he did not do so.

13. Sub-section (3) of Section 24 of the Act clearly provides that petitioner can ask for re-analysis of the sample by making a request to the Insecticide Inspector or the Court. In other words, he has the option to make such a request to the Insecticide Inspector for sending the sample for re-testing to the Central Insecticides Laboratory. But, no action in the matter was taken either by the concerned authority. The petitioners were, thus, clearly deprived of their valuable right of getting the sample re-tested from the Central Insecticides Laboratory, and instead, complaint was filed against them in Court."

12. It is true that in the above cited decision on facts of the High Court found that the accused had not received any intimation about filing of the complaint before the expiry of self-life of the sample. In the present case, though the complaint is filed well in time but as provided under the scheme the present petitioner had already intimated to the complainant that the accused-company would like to have the sample retested by the CIL. On the day of hearing, the complainant had remind present and in response to the query raised by the

Court, ld.APP, Ms.N.V. Joshi, on instructs submits that according to the complainant he was not under obligation to send the sample for reanalysis as it was not drawn from the petitioner-accused nor was obligatory to have the wish/desire of the accused-company so that the Court can send second part of the sample for reanalysis before issuing process. In such a situation, to avoid abuse of process of law or unwarranted litigation, it is open for the Court to send the second sample for retesting if any of the parties is found to have expressed his wish/desire to have the sample retested. By passing a specific order, on the point as to who will bear the cost of such reanalysis or retest by the CIL and the party put under obligation to pay the costs fails to deposit the amount, then the Court may not forward sample for retest to CIL. In the present case, it is submitted by Mr.Sharma that the day on which the complaint was filed, a portion of the sample kept by the complainant was tendered to the Court but ultimately, an endorsement found on muddamal list reveals that only list was tendered to the Court and the sample was retained by the complainant. The said endorsement reads as under :

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(Gujarati version. Hand written in original judgment)

(Meaning thereby, the muddamal sample has been kept by the complainant and the same shall be tendered to the Court on demand, signed by Mr.B.K. Makasana, Agril.Inspector, Surendranagar.) Ms. N.V.Joshi, ld.APP, has attempted to clarify that this was done at the instance of the Court and the sample can be preserved well. But the relevant point that on that day the complainant could have clarified that the accused-company has already asked for retesting by the CIL. There is nothing on record to show that this gesture was ever made. The complainant was also informed that the accused-company is ready to bear the expenses but as discussed earlier, the payment of cost rests on the decision of the Court. So it would not be legal to say that option for manufacturer to have retesting is available only by one way i.e. praying before the Court. It is very likely that in such a situation, there may be interest of conflict between the dealer/retailer and the manufacturer and one may ask for reanalysis and other may also object the same. But it is the privilege of all the

accused persons to demand retesting and the present petitioner had already extended that demand to the complainant in the period prescribed. In the case of Harminder Singh v. State of Punjab, the Court found that the sample misbranded was neither sent for reanalysis nor was produced in the Court. Under sub-section (4) of Section 24 of the Act quoted above, the Court has at its own discretion or at the request of the complainant or the accused can ask the sample produced before it to send for testing or analysis to the CIL. In the present case, when the complainant though aware about the demand made by the accused-company, had not intimated the Court, the day on which the complaint was filed. When the complainant filed a complaint, he ought to have intimated the Court about the demand of the accused-company for reanalysis, otherwise the Court could have sent the sample for reanalysis deciding the cost factor as reflected in sub-section (5) of Section 24 of the Act.

13. It would be beneficial to reproduce the observations made by the Punjab and Haryana High Court in the case of Harmindar Singh (supra), which is as under :

> "2. It is not disputed that on 30.10.1989, i.e. before the filing of complaint, Annexure P-1, an application was filed by the manufacturer with a prayer that the complainant be directed to produce the sample in Court and the sample may be got analysed from any laboratory at the cost and expenses of the petitioner. Despite the prayer made in the application, neither the sample was produced in the Court, nor was sent for re-testing. Under sub-section (4) of section 24 of the Insecticides Act, the Court as its own discretion or at the request of the complainant or accused, can cause the sample of insecticides produced before it to be sent for test or analysis to the Central Laboratory. Admittedly, the sample was not produced for re-analysis, at the request made on behalf of manufacturer who was co-accused in the complaint and in this way, the petitioner was deprived of his valuable right to get the sample re-analysed. These very grounds prevailed upon the Court at the time the complaint qua the manufacturer was quashed in Criminal Misc. No.3737-M of 1994. Accordingly, the complaint against the petitioner too deserves to be quashed, being an abuse of process of the Court."

14. In view of above observations, the Court is not in agreement with the say of Ms.N.V. Joshi, ld.APP, that the petitioner should be asked to face the prosecution as he had failed in requesting the Court well in time to send the sample for reanalysis to CIL though the sample had not reached to the date of expiry and he does not fall in the category of a person from whom the sample was drawn. It emerges that retention of the sample by the complainant himself though the complainant had received the reply to the notice to show cause well in time asking him to send the sample for reanalysis to the CIL is resulted into violation of mandatory provisions and the entire purpose of the statute; especially the scheme of Sections 22 and 24 of the Act. Merely because plea was recorded, the Court ought not have refused to turn down the proceedings. It emerges from record/proceedings drawn by the Court that till 7th November, 2003, even the accused persons were not supplied with the papers and the relevant papers were handed over to the accused persons on that day. This part also cannot be ignored including the date. The self-expiry date of the sample is shown to be of June, 2003 and till that date though the proceedings were initiated, the copies of the papers upon which the prosecution relies were not given to the accused-company.

15. For short, the present petition succeeds and it is held that the ld.trial Judge ought to have terminated the proceedings against the present accused-company. For the sake of argument if it is accepted that the ld.trial Judge could not have dropped the proceedings under Section 258 of the Code of Criminal Procedure, even then on rejection of the application Exh.18, the petitioner-company at least could have approached this Court for quashing proceedings alleging that the same is or can be said to have been instituted on deprivation of a valuable defence statutorily available to the petitioner under Section 482 of the Code of Criminal Procedure r/w. Article 226/227 of the Constitution of India. If the prosecution is permitted to be continued, even then it would render fruitless. The petition, therefore, is allowed and the criminal complaint being C.C. No.1462 of 2001 filed before the Court of Chief Judicial Magistrate, Surendranagar, and the proceedings initiated thereon are hereby quashed and set aside qua the present petitioner-accused.

Rule is made absolute accordingly.

Direct Service is permitted.

(C.K. Buch, J)

Aakar